



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 22, 2024

CBCA 8123-FEMA

In the Matter of CITY OF LONGVIEW, TEXAS

Jimmie Mathews and Benjamin Mathews of Mathews & Freeland, LLP, Austin, TX, counsel for Applicant.

Julie A. Masek, Assistant General Counsel, The Texas A&M University System, College Station, TX, counsel for Grantee; and Sherri LaCour, Division Chief, and Joshua Hollingsworth, Unit Chief, Texas Division of Emergency Management, Austin, TX, appearing for Grantee.

Christiana Cooley, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **LESTER**, **KULLBERG**, and **KANG**.

KULLBERG, Board Judge, writing for the Panel.

The applicant, City of Longview, Texas (Longview), seeks public assistance (PA) in the amount of \$1,836,651.45 for the cost of repairs to the Land O Pines Raw Water Intake Facility (LOP). The Federal Emergency Management Agency (FEMA) contends that it did not receive notice from Longview of changes in the statement of work (SOW) before beginning these repairs to the LOP, and FEMA seeks to limit PA to a previously capped amount. Longview contends that it did give notice of those changes in the SOW to the Texas Department of Emergency Management (TDEM). For the reasons stated below, the panel finds that FEMA shall pay Longview the previously capped amount of \$578,792.

Background

On March 19, 2016, a major disaster, DR-4266-TX, was declared in the state of Texas because of severe storms and flooding occurring between March 7 and 29, 2016. The disaster's storms and flooding caused damage to Longview's LOP. Request for Arbitration, Attachment 21 at Longview 184.¹ Longview requested public assistance (PA) for repairs to the LOP, and, on February 23, 2017, FEMA prepared project work sheet (PW) 00245 showing \$771,723 as the total cost for repairs. Attachment 4 at 64-68. In an email dated February 16, 2017, FEMA cautioned Longview regarding the following:

At this point there are still a lot of unknowns without a geotechnical study, site survey, etc.[,] and we acknowledged that this information will impact both the cost to repair the facility back to pre-disaster condition (surveyed quantities within the facility boundary will impact the pre-disaster scope) and the mitigation cost as items such as depth of sheet pile, depth of existing footings can be defined.

The plan is for this project is to put it into the system as it is right now and once you have obtained more information [from] the soil test, site survey[,] and such[,] then you can request a Change in Scope of Work through your State [point of contact] presenting the additional information gained from those studies.

Attachment 3 at 60.

FEMA's August 28, 2017, determination memorandum (DM) found that the LOP was under the authority of the United States Army Corps of Engineers (USACE) and that Longview, as a result, was not eligible to receive PA. Attachment 4, at 70. On June 13, 2018, FEMA reversed its August 28, 2017, DM and advised Longview that it would approve the payment of PA and issued PW 00245, version (ver.) 1. Attachment 5 at 75. Longview's PA for the LOP was limited to the seventy-five percent federal share of the total cost of \$771,723, which amounted to \$578,792.25. Attachments 8 at 84, 21 at 184.

On January 14, 2020, Longview notified TDEM that it had revised its 2016 estimate, and that its 2019 increased "bid pricing" for the project was due to higher material costs and

¹ Longview's request for arbitration included twenty-four attachments with consecutively numbered pages. Unless otherwise noted, references to attachments are from Longview's request for arbitration. Subsequent references to page numbers will omit the reference to Longview.

the need to address findings in a geotechnical report, which called for additional sheet piling, a greater depth for pilings, and relocation of electrical components. Attachment 12 at 112. An email from TDEM to Longview, dated January 31, 2020, stated the following regarding the increased cost:

This looks like an improvement instead of a cost difference, so if it is[,] it will be an Improved Project which is capped. Which means no additional funding except for maybe the additional mitigation. Make sure to include the geotechnical report, [to] show where the current electrical is and plans on relocation and federal permits vs[,] buying American.

When you write this up[,] make sure you have drawing and the cost analyst mentioned in the “quarterly report 2016 estimate vs[,] 2019 bid pricing.[”] Include everything you possible [sic] can.

Attachment 13 at 115.

On February 17, 2020, Longview began mobilization of the project, and final completion was certified on July 23, 2020. Attachments 16 at 155, 17 at 159. On February 10, 2021, Longview submitted to TDEM its summary of the actual cost of the repairs to the LOP, \$1,829,229, which included the original \$771,723 estimate. Attachment 18 at 161. TDEM forwarded Longview’s request for PA to FEMA on June 25, 2021. Attachment 19 at 174-75.

On August 22, 2023, FEMA issued its DM, which found that Longview was not eligible for PA for the increased costs of the revised SOW for the LOP. Attachment 21 at 188. The DM noted that Longview “completed a revised SOW without FEMA approval and after the Period of Performance[,] as required, which precluded FEMA from performing its necessary [environmental and historic preservation (EHP)] reviews prior to completion of the revised SOW.” *Id.* Additionally, the DM noted that Longview had sought hazard mitigation costs that were “more than 100% of the repair cost and there was not a benefit-cost analysis performed for this work.” *Id.* The DM concluded that because Longview had completed a revised SOW without FEMA approval and the requested repairs were not cost effective, Longview’s request for PA “including the previously obligated federal share of \$578,792.25, is denied.” *Id.*

On November 10, 2023, Longview appealed FEMA’s denial of PA for repairs to the LOP. Attachment 22 at 191-92. Generally, Longview cited the increased costs related to the delay in commencing work as well as the need for making repairs without further delay. *Id.* On April 9, 2024, FEMA’s denied Longview’s appeal. Attachment 23 at 305. FEMA stated the following:

[T]he Subrecipient did not notify FEMA of [SOW] modifications prior to the commencement of the work, precluding FEMA from reviewing the changes and from completing an updated [EHP] review and benefit cost analysis of the hazard mitigation work. Therefore, FEMA will cap this project as an Improved Project at the original amount of \$771,723, deny the additional requested funding and remand the additional Improved Project SOW to EHP for compliance review. Should EHP determine the Improve Project SOW to be non-compliant, the capped funding may be de-obligated. Accordingly, this appeal is partially approved.

Id. Longview subsequently requested arbitration, and the Board docketed this matter on June 11, 2024. The parties did not request a hearing but, instead, elected that the panel hear this matter on the written record. Both parties submitted briefs.

Discussion

At issue is what amount of PA Longview may receive, if any, for the costs it incurred for repairs to the LOP and whether that amount may exceed the funding authorized by FEMA under PW 00245, ver. 1. The Code of Federal Regulations (CFR) provides that eligibility for PA funding requires a showing that such work was “required as the result of the emergency or major disaster event.” 44 CFR 206.223(a)(1) (2015). In the event of a cost overrun, the following applies:

The subgrantee must evaluate each cost overrun and, when justified, submit a request for additional funding through the Grantee to the Regional Administrator for a final determination. All requests for the Regional Administrator’s approval will contain sufficient documentation to support the eligibility of all claimed work and costs. The Grantee must include a written recommendation when forwarding the request.

44 CFR 206.204(e)(2). In general, the CFR provides that the recipient of a federal award is “required to report deviations from budget or project scope or objective, and request prior approvals from Federal awarding agencies for budget and program revisions.” 2 CFR 200.308(b). With regard to large projects, the CFR provides the following:

The Regional Administrator shall review the accounting to determine the eligible amount of reimbursement for each large project and approve eligible costs. If a discrepancy between reported costs and approved funding exists, the Regional Administrator may conduct field reviews to gather additional information. If discrepancies in the claim cannot be resolve through a field review, a Federal audit may be conducted. If the Regional Administrator

determines that eligible costs exceed the initial approval, he/she will obligate additional funds as necessary.

44 CFR 206.205(b)(2). A “large project” is defined as “an individual project . . . \$120,000 or greater.” *Id.* 206.203(c)(1).

FEMA’s Public Assistance Program and Policy Guide (PAPPG) (Jan. 2016) provides the following:

While proceeding with the project, the Applicant must ensure that it uses PA funding only for eligible work. The Applicant should engage the Recipient and FEMA as soon as it identifies a change to the SOW to allow FEMA time to review changes for eligibility and EHP compliance requirements prior to commencement of work. If the Applicant begins work associated with change before FEMA review and approval, it will jeopardize PA funding.

....

A change requires a written request from the Applicant to the Recipient, including detailed justification and documentation to support the eligibility of the requested revision.

PAPPG at 130-31 (footnotes omitted). The PAPPG further provides the following:

The Recipient must certify that all incurred costs are associated with the approved SOW and that the Subrecipient completed all work in accordance with FEMA regulations and policies. The Recipient must submit its certification of completion of each Large Project with the final payment of claim and supporting documentation to FEMA within 180 days from the date that the Subrecipient completes each Large Project.

FEMA reviews the documentation and, if necessary, obligates additional funds or reduces funding based on actual costs to complete the eligible SOW.

If the project included approved hazard mitigation measures, FEMA does not re-evaluate the cost-effectiveness of the [hazard mitigation planning (HMP)] based on the final actual cost. If during review FEMA determines that the Subrecipient performed work that was not included in the approved SOW, FEMA will designate the project as an Improved Project, cap the funding at the original estimated amount, and review the additional SOW for EHP compliance.

Id. at 138-39 (footnotes omitted). An improved project “restores the pre-disaster function, and at least the same capacity, of the damaged facility and incorporates improvements or changes to its pre-disaster design.” *Id.* at 100.

The panel finds that Longview may only receive PA in the amount of \$578,792.25, which is seventy-five percent of the capped amount, \$771,723, allowed under PW 00245, ver. 1. We deny Longview’s request for PA in excess of that amount. The record shows that Longview incurred increased expenses for repairs to the LOP, amounting to an improved project FEMA never approved; the lack of such approval precludes payment of any additional amount of PA.

Longview contends that it gave sufficient notice of the increased cost of repairs and that it complied with the requirement for giving notice of the changes to the SOW. However, the record shows that FEMA never received Longview’s proposed changes to the SOW and FEMA never approved such changes. While Longview argues that TDEM was aware of the increased costs, the exchange of emails between Longview and TDEM shows that their discussions were preliminary to any request for changes to the SOW and lacked the necessary approval required by FEMA.

FEMA contends that while it concurs with payment of PA in the amount of \$578,792.25, this matter should be remanded to FEMA for EHP review. The panel does not find such a measure to be necessary. FEMA has suggested that it may determine on remand that Longview should receive no PA. As the purpose of this arbitration panel is to resolve matters whenever possible, we find no purpose to be gained from sending this matter back to FEMA for a proceeding that should have been accomplished earlier.

Decision

FEMA shall pay PA to Longview in the amount of \$578,792.25.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Jonathan L. Kang
JONATHAN L. KANG
Board Judge